No. 86-629

IN THE

Supreme Court of the United States

October Term, 1986

SEATTLE MASTER BUILDERS ASSOCIATION, et al.,
Petitioners,

v.

PACIFIC NORTHWEST ELECTRIC POWER
AND CONSERVATION PLANNING COUNCIL,
Respondent,

UNITED STATES OF AMERICA,
Intervenor-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

The Petitioners reply to arguments first raised in the briefs in opposition filed by Respondent Pacific Northwest Electric Power and Conservation Planning Council ("Council") and Intervenor-Respondent United States.

1. **The Appointments Clause Issue Is Ripe For Review.**

The United States claims that the Appointments Clause issue is not ripe for review. The United States' argument hinges on one point: that "the only 'enforcement' mechanism related to the MCS is contained in 16 U.S.C. 839b(f)(2)." (U.S. 15). The United States is correct that the Council only has the power to recommend a surcharge.[1] However, the surcharge is not the Act's only MCS enforcement mechanism.

[1] The United States ignores, however, that such a recommendation is a *precondition* to BPA's right to impose one. *See* 16 U.S.C. § 839b(f)(2) ("the [BPA] Administrator may *thereafter* impose such a surcharge . . ." (emphasis added)).

The Act *requires* BPA to implement the Council's conservation requirements — here, the MCS. *See* 16 U.S.C. §§ 839d(b)(2), 839d(a)(1), 839d(b)(5).[2] BPA must administer the Act consistent with that end by taking such actions as setting up financial incentive programs. The Act gives the Council a specific enforcement mechanism to use *against BPA* if BPA refuses: the Council can compel BPA to make a final decision on refusal to comply, and then sue BPA in the Ninth Circuit for its refusal. *See* 16 U.S.C. § 839b(j). It is *these* powers that are the source of the Petitioners' injury. *See* § 2, *infra*.

The United States is trying to convince this Court that the Act is an "all or nothing" proposition: either the Council has complete authority over the BPA, or it has none. This ignores Congress' intent to grant the Council a mix of mandatory and advisory powers. As Representative Thomas Foley of Washington, one of the Act's leading supporters, stated:

> The heart of the regional planning provisions, the council's role relative to BPA has become much more clearly defined as the bill progressed. Instead of a mere planning body, or a mere advisory body, *it now has a mix of mandatory and discretionary oversight functions and control.* It has also become a nascent independent body, potentially an enormous force in the future of the region. As a result, despite the fears of those familiar with the bill only as originally introduced, the BPA administrator will not be a "czar" under this bill.

126 Cong.Rec. H9863 (daily ed. Sept. 29, 1980) (emphasis added).[3]

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[2] The Council's Brief filed does not address the question of the scope of its authority over BPA. Such coyness before this Court should not obscure the Council's clash before the Ninth Circuit with the United States' claim (reiterated here) that BPA is not bound in any way to implement the MCS. The Council argued to the Ninth Circuit that the MCS did bind BPA, and therefore "the court *must* decide whether the Council members are federal officers" subject to the Appointments Clause (Council's Reply to U.S. before Ninth Circuit at 5).

[3] The United States makes much of Representative Dingell's opposition to an unsuccessful amendment that would have made

(footnote continued on next page)

The United States suggests that, in any case, this Court should wait for another case that will raise the Appointments Clause issue. (U.S. 17-18). This is in neither the regional nor the national interest. The Pacific Northwest needs to know *now* whether the MCS are mandatory, and if they are, whether the Council may exercise such authority. It is impossible for key regional actors to plan for the future when they can not tell who is in charge of what. *Accord* (Brief of Amicus Curiae Idaho Cooperative Utilities Association 13 n.6).

As for the national interest, the Council's powers are proving an enticing model in other public policy areas. (Brief of Amicus Curiae National Association of Homeholders (NAHB) 3-5). The recent passage of the Columbia River Gorge Act, H.R. 5705 (1986), granting powers similar to the Council's to another state appointed body, confirms the tempting nature of such arrangements.[4] Unless this Court acts now, the corrective task will soon assume Augean proportions. *Cf. INS*

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the Council's surcharge recommendation manadatory. (U.S. 16). However, it ignores that Representative Dingell, in other stages during the debate over the Act, made clear his agreement that the Council would serve as a substantive check on BPA authority:

> This bill does not establish the [BPA] Administrator as an "energy czar" but rather, by providing for a public planning council, it permits coordinated electric power planning with wide input by the public. *The council has more than planning authority; it acts as a check on the administrator.*

126 Cong.Rec. H9849 (daily ed. Sept. 29, 1980) (emphasis added).

[4] President Reagan, in signing the Columbia River Gorge Act, made clear his serious concerns about the constitutionality of lodging such authority in the hands of state appointees:

> I have grave doubts as to the constitutionality of the provision in section 10, which would authorize the Governors of Washington and Oregon and the State-appointed Columbia River Gorge Commission to disapprove Federal condemnation actions. The Federal Government may not constitutionally be bound by such State action taken pursuant to Federal law.

Statement by President Ronald Reagan (November 11, 1986).

v. Chadha, 462 U.S. 919, 944-45 (opinion for the court), 1003-1015 (Appendix to dissenting opinion of White, J.) (1983).[5]

2. The Appointments Clause Issue Is Not Moot.

The United States claims that the on-going process of Plan revision has rendered the Appointments Clause issue moot. (U.S. 19-20). The United States is wrong.

First, the United States misapprehends the injury that gives rise to the Petitioners' Appointments Clause claim. The Council's power to compel BPA to take steps to adopt the MCS has caused jurisdictions throughout the Pacific Northwest to adopt the MCS, and others to move towards adoption. Both adoption of the MCS (at *whatever* level presently under discussion) and the risk of adoption cause the Petitioners substantial injury. *See Duke Power Co.*, 438 U.S. at 72, 74. That the Plan is in the process of potential revision does not change the material fact that the mandatory nature of the Council's power over BPA has caused, and will continue to cause, such injury.

Second, the United States misapprehends the mootness doctrine. If the United States' point is accepted, the Council's appointment would be, for all practical purposes, exempted from judicial review. All the United States has shown is that

[5] Moreover, the federal courts may *not* wait to decide the Appointments Clause issue. Congress mandated prompt resolution of questions arising under the Act, such as the Council's authority, by vesting original jurisdiction in the Ninth Circuit and bypassing the district court stage. 16 U.S.C. § 839f(e) (5); *see Forelaws on Board v. Johnson*, 709 F.2d 1310, 1312 (9th Cir. 1983); *Public Power Council v. Johnson*, 674 F.2d 791, 795 (1982), *rev'd on the other grounds, sub. nom. ALCOA v. Cent. Lincoln Peoples Util. Dis.*, 467 U.S. 380 (1984). Congress then provided for rapid reconstitution of the Council, by Secretary of Energy appointment, in the event state governor appointment was struck down. 16 U.S.C. § 839b(6). Such a mandate for prompt review and resolution of basic structural issues *forecloses* the right of a court to defer adjudication of such issues to another day, on ripeness grounds. *See Duke Power Co. v. Carolina Env. Study Group, Inc.*, 438 U.S. 59, 81-82 (1978).

the Plan is in the process of reevaluation. *See* 16 U.S.C. § 839b(d)(1); (Council 5 n.6). If the fact of reevaluation was generally enough to bar review, then this case represents one of the classic *exceptions* to the mootness doctrine; a matter "capable of repetition, yet evading review." *E.g., Press-Enterprise Co. v. Riverside Cy., California, Superior Ct.*, 106 S. Ct. 2735, 2739 (1986).[6]

3. **The Ninth Circuit's Decision on the Appointments Clause is Judgment.**

The Council appears to claim the Ninth Circuit's Appointments Clause decision is merely an opinion; an extended exercise in *obiter dicta*. (Council 22). The Council is wrong; and if not, its argument provides an independent basis for review.

The Ninth Circut's decision is not *dicta*. As previously indicated, the MCS do bind BPA, thereby injuring the Petitioners. *See* § 1,*supra*. Once the Ninth Circuit declined to grant the Petitioners relief on statutory grounds (i.e., violation of the Act's economic feasibility requirement; failure to comply with environmental laws), it *had* to decide the Appointments Clause issue. *Cf. Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936).[7]

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[6] Moreover, if the United States is *right*, its point is a basis *for* review and reversal. The process of reevaluation was underway *before* the Ninth Circuit's decision: the Council formally amended the MCS before the Ninth Circuit's decision. (Council 5 n. 6). In addition, three separate actions were filed in the Ninth Circuit challenging those amendments. Those actions raise, *inter alia*, many of the issues raised by the Petitioners. If such a cycle of reevaluation and challenge rendered the Petitioners' challenge moot, then the petition should still be granted, and the Ninth Circuit's decision *summarily reversed*, for a violation of the jurisdictional bar against advisory opinions in the absence of a case or controversy.

[7] This is a point with which the Council *fully* concurred before the Ninth Circuit. Council's Reply Br. to U.S. before Ninth Circuit at 5. *See also*, note 2, *supra*.

However, if the Ninth Circuit's decision *is dicta*, it is so for a reason that requires review and reversal. The decision is *dicta* only if the MCS are not binding on BPA. If that were true, the Petitioners would lack standing to make the Appointments Clause claim, and the Ninth Circuit would lack the *power* to make a decision on that issue. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). The resulting exercise in forbidden advisory opinion making would demand summary reversal.

4. The MCS Do Have A Significant Impact On The Quality Of The Human Environment.

The United States claims that the MCS do not have a significant impact on the quality of the human environment, "because they are only proposals, upon which [BPA] . . . may or may not base a rate surcharge." (U.S. 20 n.9). As previously demonstrated, § 1, *supra*, the Act requires BPA to take affirmative steps to implement the MCS: *Ergo*, the MCS *do* have a significant impact on the quality of the human environment.

5. The Council Must Comply with An Environmental Impact Statement Requirement.

The United States and the Council claim that because the Act states that the Council may not be considered an agency of the United States for the purpose of Federal law, and NEPA applies only to agencies of the Federal government, the Council therefore is exempt from federal environmental impact statement ("EIS") requirements. (U.S. 21 n.9); (Council 24). However, both ignore the logical implication of their argument. The Act requires that it be "construed in a manner consistent with applicable environmental laws." 16 U.S.C. § 839. If federal environmental laws do not apply to the Council and the MCS, then *state laws must apply*. The only alternative is *no* EIS compliance requirement; such a result would render 16 U.S.C. § 839 meaningless, and nullify Congress' intent to subject the Council's actions to environmental law requirements.

6. The National Environmental Policy Act Issue Was Properly Before the Ninth Circuit.

Contrary to the contention of the Council (Council 7 n.7, 24), the Petitioners raised the issue of the applicability of the National Environmental Policy Act (NEPA) before the Court of Appeals, *see* Petitioners' Reply Brief before the Ninth Circuit at 18, *without objection from the Council.*

7. The Economic Feasibility Standard Issue Is Not Moot.

The United States' claim that the economic feasibilty standard issue is moot misses the point. The issue is not, as the U.S. implies (U.S. 18-21), whether BPA or the Council are evaluating or have evaluated the economic feasibility of the MCS, but whether, in doing so, they are using the definition of economic feasibility that complies with congressional intent.

Nothing in the United States' Brief indicates that they are. While the United States claims that "under the new MCS specifications advanced by BPA each measure satisfies the *cost-effectiveness* criterion," (U.S. 20) (emphasis added), the Petitioners' challenge is to the Council's application of the *economic feasibility* standard. "Cost effectiveness *for the region*" and "economic feasibility *for consumers*" are separate standards, 16 U.S.C. § 839b(f)(1) (emphasis added), requiring separate methods of analysis.

The United States asserts that, "under the new MCS packages developed by BPA, present value costs of new homes are . . . the same or less than the cost of comparable homes built to existing standards." (U.S. 20). This assertion is based on the same analytical method used by the Council to justify the original MCS. The Petitioners' quarrel is with that method: the meaning of economic feasibility intended by Congress requires a different method of analysis. (Pet. 24-30). Only if the congressionally intended method is employed will housing consumers be spared hundreds of millions of dollars in cost Congress never intended them to bear. (Pet. 29-30).

Hence, even if the proposals before the Council are adopted, the issue will remain.[8]

8. Regional Issues Arising Under The Act Warrant Supreme Court Review.

The United States claims the regional interest in resolving issues peculiar to the Act do not warrant this Court's review. (U.S. 19).[9] This represents an about-face from the United States' position in *ALCOA v. Central Lincoln People's Utility District*, 467 U.S. 380 (1984). Like this case, *ALCOA* involved interpretation of the Act — specifically, the meaning of electric power "preference" provisions. The United States' brief in *support* of the petition for *certiorari* stated:

> [We] recognize that this case may not satisify the traditional criteria for certiorari. The decision below will affect only the Pacific Northwest; in addition, there is no conflict among the circuit courts. We note, on the other hand, that, because original jurisdiction is vested exclusively in the court of appeals for the region... there is no prospect of a direct conflict of decisions. Accordingly, it is unlikely that the court below will be persuaded to correct its misreading of the statute, especially given the absence of any clear guidance from this Court, which has had no occasion to consider preference clauses in a like

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[8] The methodolgy used by the Council and BPA is the one Ninth Circuit affirmed. (Pet. App. A-36). Even if, as the Council hints might happen (Council 25 n. 22), the Council and BPA were to later adopt an MCS that fortuitously complies with congressional intent, they would not be bound to continue to do so, in light of Ninth Circuit precedent.

Moreover, as the NAHB demonstrates, the Concil has once before promised to follow a definition of economic feasibility that accorded with congressional intent, then later acted contrary to it. (NAHB 7-8). Unless this Court grants *certiorari* and reverses, the Council may do so again.

[9] The Council appears to agree. (Council 25). This argument does discredit to the Council's responsibility for the economic well-being of the Pacific Northwest; a responsibility eloquently articulated by the Council itself. (Council 2-4).

> context. Moreover, the practical fact is that the decision below could have a severe impact on the national economy: approximately one-third of the nation's total aluminum supply is produced by BPA's DSI customers, many of whom may terminate operations if the court of appeals' decision is not reversed. In addition, BPA provides more than 50% of the power in the Pacific Northwest....
>
> [T]hese considerations justify granting the petition.

Brief for the Federal Respondent at 8 - 9 in *ALCOA* (citations deleted).

Such considerations also justify granting this petition. Here again, it is unlikely that the court below will be persuaded to correct its misreading of the statute, especially since this Court has had no other occasion to consider the meaning of an "economic feasibility" requirment for energy conservation programs in a like context. Here again, the practical fact is that the decision below will have a severe economic impact at least on the region, and potentially the country. (Pet. 29-30; NAHB 5-6). The Petitioners respectfully suggest the United States' position in *ALCOA*, regarding the importance of interpretation of the Act, reflects sounder reasoning than the one advanced now, and urge this Court to follow the *ALCOA* precedent.

CONCLUSION

For these reasons, and the reasons stated in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

RESPECTFULLY SUBMITTED this 2nd day of January, 1987.

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